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No. 87-437

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RICHARD PINKNEY, et al.,

Petitioners,

v.

DOW CHEMICAL COMPANY, et al.,

Respondents.

In re "Agent Orange" Product Liability Litigation

BRIEF OF AGENT ORANGE PLAINTIFFS' MANAGEMENT COMMITTEE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PARTIES

Respondents are members of the class who are represented by court-appointed lead counsel to the class, designated in the courts below as the Plaintiffs' Management Committee ("PMC"). As of October 1, 1987, 248,515 individual members of the class have made claims against the settlement fund. To avoid burdening this Court and its staff with the citation of 248,515 names, Mr. George Ewalt, who was one of the named representative plaintiffs in the courts below, has been designated as the named respondent for purposes of Rule 28.1.

This brief filed by the PMC is related to the Pinkney petition only. The various petitions for certiorari arising out of the Agent Orange litigation are unrelated to each other and should be separately considered.

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PRELIMINARY STATEMENT

On May 7, 1984, facing formidable legal and factual obstacles, duly appointed counsel for the class agreed to settle the Agent Orange litigation for $180,000,000.00, subject to court approval. As of that day, no veteran, or lawyer for any veteran, had opposed class certification or jurisdiction of the federal court. All attorneys for veteran class members, including counsel for petitioner, had urged that the claims proceed in the class action context.

As of September 30, 1987, the District Court held $227,693,285.76 on deposit in the fund for the benefit of eligible class members. This fund is the only source of life improving benefits for class members.

In approving the settlement, Chief Judge Jack B. Weinstein of the Eastern District of New York rendered an opinion which properly weighed and determined factual and legal matters which bore upon the propriety of the settlement. Factual and legal problems, each potentially dispositive of all of the veterans' claims, were carefully and exhaustively weighed in the trial court's lengthy opinion approving the settlement. 597 F. Supp. 740, 775-851.

The Court of Appeals for the Second Circuit decided that objections to the settlement on grounds pertaining to jurisdiction and notice were meritless. The court affirmed Judge Weinstein's opinion, finding "compelling" reasons why the settlement was and is a totally appropriate resolution of the case. Petitions for *en banc* rehearing were unanimously denied by each justice of the Second Circuit on June 5, 1987.

Petitioner is urging the Court to overrule more than 66 years of established authority relating to principles of diversity jurisdiction and established authority relating to notice requirements in class actions. The petition wholly disregards the Supreme Court's settled practice of reviewing judgments, not statements in opinions. It also ignores this Court's settled practice of accepting factual determinations in which the District Court and the Court of Appeals have concurred.

STATUTES AND RULES INVOLVED

28 U.S.C. Rule 17.1 (1984)

17. Considerations Governing Review on Certiorari

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

28 U.S.C. §1332

§1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title [28 U.S.C.S. §1603(a)], as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title [28 U.S.C.S. §1441], a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: Provided further, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principle place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

Fed. R. Civ. P. 54(b)

Rule 54. Judgments; Costs

* * *

(b) Judgments upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Fed. R. Civ. P. 23(c)(2)

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

* * *

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that

(A) the court will exclude him from the class if he so requests by a specified date;

(B) the judgment, whether favorable or not, will include all members who do not request exclusion; and

(C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

REASONS WHY CERTIORARI SHOULD BE DENIED

I.

THE ONLY JUDGMENT ARGUABLY REVIEWABLE BY THIS COURT IS THE JUDGMENT AFFIRMING APPROVAL OF THE SETTLEMENT. THE PETITION DOES NOT SEEK REVIEW OF THAT JUDGMENT.

The social and moral issues which made this litigation into an emotionally charged and highly visible case were, and continue to be, issues which are vitally important to the Vietnam veterans whose lives may have been affected by Agent Orange. However, those issues are not before this Court on the petition for certiorari. The case was settled and the legal and factual issues which created headlines were never tried.

Regardless of the publicity received by the causes, the settlement of the litigation involves no issue which merits Supreme Court review. There are no "special and compelling" reasons for the settlement to be reviewed by this Court. *See* 28 U.S.C. Rule 17.1 (1984).

The petition asks that certiorari be granted to review issues concerning federal jurisdiction and class notice and that the class be decertified and the settlement vacated. However, it is the established practice of this Court to review "judgments, not statements in opinions." *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 734 (1978). This rule is especially applicable where, as here, petitioner purports to raise constitutional issues with respect to such statements. *Id.* This Court may avoid the unnecessary resolution of such issues.

Petitioner is not seeking review of an order certifying a class, approving class notice or finding jurisdiction over

any individual class member. Petitioner does not seek to review the fairness of the settlement. Although the Court of Appeals upheld the validity of the district court's jurisdiction and the propriety of the class notice in its judgment affirming the approval of the settlement, resolution of those issues was not essential to that judgment. In all class action settlements, the primary factor in determining whether the settlement should be approved is the relative strength of the claims of the plaintiffs. The judgment below is limited to approval of the settlement, and the grant of certiorari to review the matters raised by petitioner would be improper under *F.C.C. v. Pacifica Foundation.*

II.

THE PETITION DOES NOT PRESENT ANY REAL CASE OR CONTROVERSY. NO VETERAN HAS BEEN IDENTIFIED AS DESIRING TO VACATE THE SETTLEMENT OR AS HAVING STANDING TO SEEK SUCH RELIEF.

The petition states that Mr. Pinkney "has been chosen as the named party since he is typical of those class members who objected to class certification." (Petition, p. iii.) This statement alone demonstrates that no actual case or controversy is presented to this Court:

- The petition does not claim that petitioner's residence is not diverse from one or more defendants. Thus, he has no standing to make the personal jurisdiction arguments contained in the Petition. Petitioner's Agent Orange claim form states he is a resident of Baltimore, Maryland. None of the defendants are Maryland residents.
- The petition does not claim that petitioner did not receive notice; thus he has no standing to raise objections to notice.

— Neither Mr. Pinkney, nor any other named veteran, is described as objecting to the settlement, which is far different from objecting to class certification; thus, petitioner has no standing to raise objections to the settlement in this petition.

Even assuming *arguendo* that objections to class certification are relevant to the petition, the District Court's docket reveals no objection by Mr. Pinkney or any plaintiff to certification at any time prior to the settlement. Petitioner's counsel, Ashcraft & Gerel, were of record *urging* class certification in actions they filed which were jurisdictionally premised upon diversity of citizenship. It was not until after the settlement was reached that Ashcraft & Gerel first objected to class certification.

Without alleging that the trial court did not have personal jurisdiction over him, or that he did not receive notice, petitioner alone "assumes the risk" that the settlement will be vacated and all claims will be dismissed on summary judgment upon remand. His individual claims concerning personal jurisdiction and notice are not valid grounds for vacating a quarter-billion dollar fund which stands ready for distribution to the class members.

III.

THE FACTS OF THE CASE ARE UNIQUE, AND THE LEGAL MATTERS CONCERNING SETTLEMENT ARE NOT. NEITHER RAISES ISSUES APPROPRIATE FOR SUPREME COURT REVIEW.

After May 7, 1984, this litigation was reduced to a single ultimate issue: should the settlement be approved? The factual considerations underlying that single issue have been uniformly viewed as unique. *See* 818 F.2d 145, 148; 597 F. Supp. 740, 746; Petition, p. 5. The *sui generis* nature of the case militates against Supreme Court re-

view, as unique factual situations are unlikely to have precedential value.

Conversely, the legal theories applied to the judgments approving the settlement are as well-settled as the facts are unique. Standards to determine fairness of class settlements are not disputed. *See* 597 F. Supp. 740, 758-64. No circuit conflicts with another. No appellant, including petitioner, ever contended they were not fully complied with by Courts below.

The petition facially reveals that settlement of this case involves no federal issue. Claims against the manufacturers do not arise under the Constitution, any federal statute, or federal common law. *Cf.* 28 U.S.C. Rule 17.1 (1984). Indeed, the Second Circuit has determined there to be no identifiable federal policy at stake in this litigation. *See* 635 F.2d 987, 993-5 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1980).

In sum, the lower courts recognize this to be a settlement of essentially private litigation between private parties. No Supreme Court intervention is necessary to review the application of settled law to unique facts.

IV.

THE COURT PROPERLY EXERCISED DIVERSITY JURISDICTION OVER THE AGENT ORANGE CLASS ACTION.

The petitioner is asking this Court, as appellants did in the court below, to turn its back on over 60 years of clear precedent and to ignore the acknowledged policies upon which that precedent is based. Petitioner urges a novel interpretation of 28 U.S.C. §1332 which neither Congress nor any federal court shares, and which neither petitioner himself nor any plaintiff ever brought to the attention of the trial court.

The representative party diversity rule (i.e. in class actions, diversity is to be measured by reference to the citizenship of the named class representatives only) was first announced 66 years ago in *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921), and it has been accepted by the entire federal judiciary as applicable to every form of modern action.* This rule is of continued vitality in this Court, *see Snyder v. Harris*, 394 U.S. 332 (1969), and was recently reaffirmed by the Second Circuit in *United States ex rel. Sero v. Preiser*, 506 F.2d 1115, 1129 (2d Cir. 1974), *cert. denied*, 421 U.S. 921 (1975).

The federal judiciary has consistently held that minimal diversity in class actions is entirely in accord with Article III of the United States Constitution. *See, e.g., State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 531 (1967) and the citations at n. 7; *Twentieth Century-Fox Film Corp. v. Taylor*, 239 F. Supp. 913, 918-21 (S.D.N.Y. 1965).

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* *In re Federal Skywalk Cases*, 93 F.R.D. 415, 420 (W.D. Mo. 1982), *vacated on other grounds*, 680 F.2d 1175 (8th Cir. 1982), *cert. denied*, 459 U.S. 988 (1982) ("In the context of a class action, only the citizenship of the named parties is relevant to the determination of jurisdiction."); *In re "Dalkon Shield" IUD Products Liability Litigation*, 526 F. Supp. 887, 910 (N.D. Cal. 1981), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983) ("In a class suit, diversity is determined only by the citizenship of the named representatives."); *Casper v. Cunard Line, Ltd.*, 560 F. Supp. 240, 242 (E.D. Pa. 1983); *Esler v. Northrop Corp.*, 86 F.R.D. 20, 28 (W.D. Mo. 1979); *Illinois ex rel., Scott v. Hunt Int'l. Resources Corp.*, 481 F. Supp. 71, 73-74 (N.D. Ill. 1979); *Rocket Oil & Gas Co. v. Arkla Exploration Co.*, 435 F. Supp. 1303, 1304-05 (W.D. Okla. 1977); *Friedman v. Meyers*, 482 F.2d 435, 436, n.1 (2d Cir. 1973); *Mason v. American Express Co.*, 334 F.2d 392, 402 (2d Cir. 1964). *See also Schomber v. Jewel Companies, Inc.*, 614 F. Supp. 210, 215 (N.D. Ill. 1985); *Lumbermen's Underwriting Alliance v. Mobil Oil Corp.*, 612 F. Supp. 1166, 1168, n. 2 (D. Idaho 1985). *Pirrone v. North Hotel Associates*, 108 F.R.D. 78, 84, n. 2 (E.D. Pa. 1985); *McMahon Books, Inc. v. Willow Grove Associates*, 108 F.R.D. 32, 40, n. 5 (E.D. Pa. 1985).

In the instant case, the Court of Appeals readily acknowledged this well-established line of precedent in rejecting petitioner's argument. 818 F.2d at 162.

Petitioners contend that despite the fact that allegedly non-diverse defendants Hooker and Riverdale were dismissed from the case, they remained in the litigation for purposes of determining diversity jurisdiction because no Rule 54(b) certifications of dismissal were issued to them.

The Court of Appeals held that the purpose of Rule 54(b) is only to clarify the appealability of an order, citing *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 512 (1950). Because that is the sole purpose of Rule 54(b), a dismissed defendant who does not obtain a certification under this rule does not remain a party to the litigation for purposes of determining diversity.

Even assuming, *arguendo*, that the claims against Hooker and Riverdale could have been revived by the trial court, diversity jurisdiction is not defeated. Many events permitted by federal procedure could have served to defeat diversity jurisdiction if they had occurred, such as amending the complaint to add a named non-diverse party. The existence of this technical "possibility" does not in itself defeat diversity jurisdiction.

Furthermore, as the Court of Appeals noted, petitioner's argument with respect to Diamond Shamrock's citizenship is also without merit. When this suit was filed, Diamond Shamrock's principal place of business was in Ohio. It later moved to Texas, the domicile of named plaintiff Dan Jordan. However, as this Court has held, this subsequent relocation is irrelevant for diversity purposes. *Smith v. Sperling*, 354 U.S. 91, 93, n. 1 (1957) ("Jurisdiction, once attached, is not impaired by a party's later change of domicile.").

The jurisdictional basis of the Agent Orange class action is, therefore, in complete conformity with long-established law.

V.

THE NOTICE ORDERED AND GIVEN IN THIS CLASS ACTION SATISFIED ALL APPLICABLE AUTHORITIES; THERE IS NO CONFLICT BETWEEN THE CIRCUITS.

Petitioner has restated, almost *verbatim*, the contentions made in the Court of Appeals. In so doing, the petition again fails to show any conflict among the circuits, any compelling reason why this case should be the subject matter of Supreme Court review, or even any error on the part of either the District Court or the Second Circuit Court of Appeals.

The Circuit Court of Appeals decided the merits of the notice arguments using the proper "abuse of discretion" standard of review. The petition, however, asks this Court to again review the same questions in the same context.* It cites no appropriate reason why the Supreme Court should become involved in such a rehearing. In effect, the request is that the Supreme Court impermissibly allow itself to become a fact-finder, substituting its judgment for that of the District Court, which properly exercised that function.

The District Court and Court of Appeals concurred that the notice required by Rule 23(c)(2) was, under *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156 (1974), the "best prac-

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* This Court denied certiorari on an identical notice issue in a previous appeal in this case. *In re "Agent Orange" Product Liability Litigation sub nom. In re Diamond Shamrock Chemicals Co.*, 725 F.2d 858 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984).

ticable" under the circumstances and that the notice given provided individual notice to all members of the class who could be identified through "reasonable efforts". 597 F. Supp. 740, 763; 818 F.2d 145, 169.

The Court of Appeals weighed each of the arguments made by petitioner here and, under its correct standard of review ("whether the District Court was 'clearly erroneous' in its factual findings and whether it 'abused' its traditional discretion", 818 F.2d 145, 168), held that the District Court "adopted a creative approach appropriate to this unique case." *Id.*, at 167. The Court further held that the notice given met the requirements of Rule 23(c)(2). *Id.*, at 168.

Further, the Court of Appeals stated that the requirements urged by appellants (petitioner here) would have been "considerably overbroad" without assurance that suggested alternate lists could have been compiled through "reasonable efforts". The Court noted that the objectors had conceded there was no list that reasonably could have been compiled. 818 F.2d 145, 169.

Under all of the circumstances here, it was clear to the Court of Appeals that "no practical problem exists as to the adequacy of the notice", that there existed "no feasible alternative to the notice plan adopted by the district court", and that "under such circumstances it is inappropriate to second-guess a district court's class notice procedure". The court concluded that "the notice plan . . . was fully adequate under the circumstances." 818 F.2d 145, at 169.

Petitioner is fundamentally asking this Court to second guess the notice plan and impose its discretion on the facts of this case. There is no suggestion of conflict in the Circuits on these issues. There is also no suggestion

that the courts below did not recognize the applicable standards and comport their judgments within them. There is only the wish that this Court impermissibly re-visit the facts and impose a different discretionary result applying the same non-conflicting standards.

Such considerations are not appropriate for Supreme Court review. The request ignores *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 734 (1978), which reiterated the Supreme Court's "settled practice of reviewing judgments, not statements in opinions." It is likewise violative of the settled practice of accepting factual determinations in which the District Court and the Court of Appeals have concurred. *Branti v. Finkel*, 445 U.S. 507, 512, n. 6 (1980). In such cases it is clearly the rule that certiorari should be denied.

VI.

THERE SHOULD BE NO FURTHER DELAY IN DISTRIBUTION OF THE SETTLEMENT TO THE VETERANS DESPERATELY IN NEED.

By any measure, the settlement fund—now approaching a quarter of a billion dollars—confers substantial, life changing benefits upon thousands of our nation's veterans.

Measuring it in legal terms, the courts below have uniformly agreed that it constitutes a fair and reasonable resolution of the litigation under circumstances where there was no practicable alternative. By reason of legal obstacles noted throughout both lower courts' opinions, this recovery has been viewed as substantially more than the class members were likely to recover through trial of the case.

The district court's distribution plan provides substantial cash payments to disabled veterans and survivors of

deceased veterans. It also provides for the establishment and distribution of a wide range of services and help to veterans and their families. At this point the distribution has been delayed for nearly 3½ years since the settlement was reached. Almost all of the actual delay may be attributed to the actions of appellants and petitioner.

This Court will recognize that the single named petitioner does not voice any proper ground for the grant of certiorari, but, perhaps even more importantly, he does not voice the sentiment of the remainder of the class members. They are the ones most cruelly affected by delay in distribution.

Although the settlement finally brings an end to the controversy, it also represents a beginning. As a veteran most eloquently stated at one of the fairness hearings:

> We see the settlement as a positive step in the right direction in obtaining help for the veterans. We really don't want to go through five more years of litigation. We want an end—an end to the legal controversy. Our fight now should be in the medical community and the scientific community in getting more help. And we feel this settlement can be a catalyst for that.

The only obstacle to distribution of the settlement is this petition for certiorari. There is no valid reason for this Court to allow further delay.

CONCLUSION

For the reasons stated, and upon the authorities cited, these respondents respectfully request that the petition for writ of certiorari be denied in its entirety.

Respectfully submitted,

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